

This Opinion is Not a  
Precedent of the TTAB

Mailed: February 2, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Foxmind Canada Enterprises Ltd.*

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Serial No. 88780851

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Charles B. Kramer for Foxmind Canada Enterprises Ltd.

Amit K. Shoor, Trademark Examining Attorney, Law Office 117,  
Cynthia Tripi, Acting Managing Attorney.

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Before Wellington, Adlin and Johnson, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Foxmind Canada Enterprises Ltd. seeks registration of KABAMMM!, in standard characters, for “card games; parlor games” in International Class 28.<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the previously registered mark KABAM, also in standard characters, for “entertainment services, namely, providing on-line computer games” in International Class 41,<sup>2</sup> that

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<sup>1</sup> Application Serial No. 88780851, filed January 31, 2020 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce.

<sup>2</sup> Registration No. 4305616, issued March 19, 2013; Section 8 Declaration accepted and Section 15 Declaration acknowledged.

it is likely to cause confusion.<sup>3</sup> After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

### **I. Applicant's Proposed, Unaddressed Amendment**

During prosecution, Applicant “volunteer[ed] to amend its identification of goods to narrow it from ‘card games and parlor games’ to ‘non-electronic card games’ which is consistent with the Applicant’s actual use of the mark.” May 19, 2021 Request for Reconsideration TSDR 13. The Examining Attorney did not address the contemplated proposed amendment during prosecution, however. Instead, after Applicant again “volunteer[ed] to amend its identification” in its Appeal Brief, 10 TTABVUE 7, the Examining Attorney, in her Appeal Brief, “defer[red] to the Board’s sole jurisdiction under TMEP Section 1501.05 to consider amendments.” 12 TTABVUE 4. As explained below, whether we analyze the Section 2(d) refusal under Applicant’s current identification or the contemplated proposed amendment, the result is the same, and there is therefore no need to remand the application for consideration of the amendment.

### **II. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”)

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<sup>3</sup> The Examining Attorney withdrew the Section 2(d) refusal based on Registration No. 4488759 owned by the same Registrant (KABAM for “downloadable electronic game programs and software” in International Class 9). November 19, 2020 Office Action TSDR 4.

(setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

#### **A. The Marks**

The marks are quite similar “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). Specifically, they sound identical, convey the same meaning and commercial impression and look highly similar.

In fact, Applicant’s mark is merely Registrant’s mark with two additional “M”s and an exclamation point added to the end. The additional “M”s merely emphasize the “m” sound at the end of the term, and merely serve (along with the exclamation point) to emphasize the term KABAM as a whole, with the “M”s drawing out the term’s pronunciation and the exclamation point emphasizing and conveying excitement about Applicant’s goods. In fact, consumers will focus on the first five letters of Applicant’s mark – K-A-B-A-M – because they will be read and pronounced first, and are merely emphasized by the additional “M”s and exclamation point. *Cf.*

*In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

Neither the two added “M”s nor the added exclamation point meaningfully change the mark’s appearance, sound, meaning or commercial impression. To the contrary – two (or three) “M”s together do not make a word or convey a meaning. Rather, they stress the appearance, sound, meaning and impression of the “M” that came before them, and thus will be perceived as part and parcel of the term KABAM. This impression of the mark will be fostered by the exclamation point, which similarly stresses and emphasizes the term as a whole.

As the Examining Attorney also points out, similarity in sound (or appearance, meaning or commercial impression) alone may be enough to establish that the marks are confusingly similar. *In re 1<sup>st</sup> USA Realty Prof., Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Here, the marks are essentially identical in not just sound, but also meaning and commercial impression. Specifically, Applicant argues that “KABAMMM! invokes the ‘ZAP! BAM! and POW!’ pop art style of the 1960s,” and words in this style, such as KABAMMM!, “suggest an explosion, gunshot, or fist punch.” 10 TTABVUE 4. Whether the term “kabam” ends with a single “m” or three, it will “suggest an explosion, gunshot, or fist punch,” perhaps metaphorically. The marks also look

highly similar. This factor weighs heavily in support of finding a likelihood of confusion.<sup>4</sup>

**B. The Goods and Services, Their Channels of Trade and Classes of Consumers**

The goods and services need not be identical or even competitive in order to find a likelihood of confusion. Rather, the question is whether the goods and services are marketed in a manner that “could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 227 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“Even if the goods and

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<sup>4</sup> Applicant argues that “[t]he marks make very different commercial impressions – the cumulative effect of many differences in appearance.” 10 TTABVUE 6. Specifically, Applicant claims that its mark “contains **all** the elements that define the ‘ZAP! BAM! and POW!’ [pop art] style, including duplication and exclamation (KABAMMM!), primary colors, a cloud burst explosion, and combinations of ZAP! BANG! WHAM! and other words which define the style.” *Id.* The problem with this argument is that Applicant only seeks registration for the “duplication and exclamation,” i.e. the additional “M”s and exclamation point, not primary colors, a cloud burst explosion or “other words which define the [pop art] style.” In fact, as shown in the involved application’s drawing page, Applicant does not seek registration for “primary colors, a cloud burst explosion,” ZAP!, BANG!, WHAM! or other words which define the pop art style Applicant describes. To the contrary, Applicant seeks registration of KABAMMM! in standard characters, meaning any registration would cover use of the term in any font, color, or style. Thus, Applicant could display its involved mark in the same manner as Registrant displays its mark. *See e.g. SCM Corp. v. Royal McBee Corp.*, 395 F.2d 1018, 158 USPQ 36, 37 n.4 (CCPA 1968) (“Certain exhibits reflect the parties’ *current* practice of associating their house marks ‘SCM’ and ‘Royal’ with ‘ELECTRA’ and ‘ELECTRESS’, respectively. However, our concern here, of course, is whether ‘ELECTRA’, the mark actually registered, and ‘ELECTRESS’, the mark for which registration is sought, are confusingly similar when applied to the instant goods.”); *Denney v. Elizabeth Arden Sales Corp.*, 263 F.2d 347, 120 USPQ 480, 481 (CCPA 1959); *Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 253 F.2d 431, 117 USPQ 213, 214 (CCPA 1958). As explained above, the added elements for which Applicant seeks registration do not avoid confusion.

services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services.”); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods”); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1109 (2007).

Here, the goods and services are inherently related to the extent they all involve games, whether the games are accessed online or played in a physical format. Applicant’s argument that there is no likelihood of confusion because its games “consist of actual physical cards – non-electronic and not related to any film franchise,” while Registrant’s “are strictly electronic action games for mobile platforms based on film franchises,” 10 TTABVUE 6-7, is not persuasive. Indeed, we are bound by Applicant’s and Registrant’s identifications and cannot limit the goods or services, their channels of trade or classes of customers based on Applicant’s extrinsic evidence. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986) (“It is well settled that in a proceeding such as this, the question of likelihood of confusion must be determined by an analysis of the marks as applied to the goods identified in the application vis-à-vis the goods recited in the registration, rather than what extrinsic evidence shows those goods to be.”); *see also Tuxedo Monopoly Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) and *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1637-38 (TTAB 2009) (“we must also analyze the

similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the application and the registration at issue ... we may not limit or restrict the [goods] listed in the cited registration based on extrinsic evidence”). Here, Registrant’s services are “on-line computer games,” identified generally and without limitation, meaning that they encompass any type of online card games.

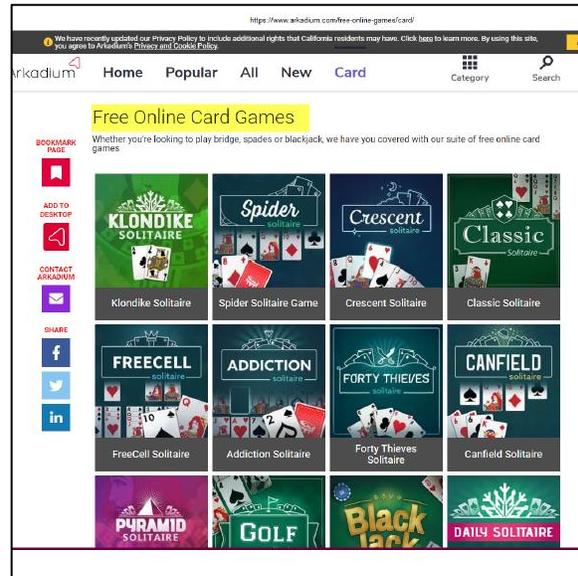
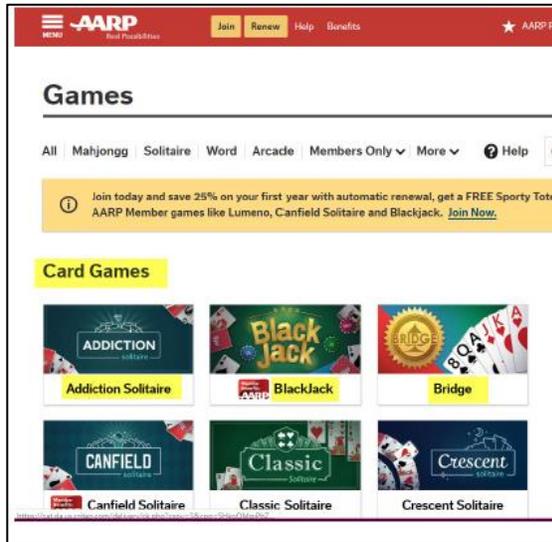
Applicant’s attempt to distinguish online from non-electronic games is unavailing. First, it is settled that goods and services may be related. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) (BIGGS for retail grocery and general merchandise store services likely to be confused with BIGGS for furniture); *In re H.J. Seiler Co.*, 289 F.2d 674, 129 USPQ 347 (CCPA 1961) (“a customer who attends a banquet which he knows is catered by the appellant would, when he encounters a food product in the grocery store under an almost identical mark, naturally assum[e] that it came from the catering firm”); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (“It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source if such goods and services are sold under the same or similar marks.”).

Second, here, as in many analogous cases, there is no meaningful distinction between providing games or more specifically card games online as a “service,” and providing the games in a more “tangible” format, such as a box of cards, perhaps accompanied by a playing board or other accessories. *Cf. In re JobDiva, Inc.*, 843 F.3d 936, 121 USPQ2d 1122, 1125-26 (Fed. Cir. 2016) (“We agree with the Board’s initial

observation that, with modern technology, the line between services and products sometimes blurs ... a mark used with a web-based offering may equally identify the provision of software, rather than a service.”); *In re Ancor Holdings LLC*, 79 USPQ2d 1218, 1221 (TTAB 2006) (referring to “the blurring between services and products that has occurred with the development and growth of web-based products and services”).

The record bears this out. It shows that game trademarks including UNO, DUNGEONS & DRAGONS, MONOPOLY and STREET FIGHTER are used for online computer games on the one hand, and non-electronic card or board games on the other. July 8, 2021 Denial of Request for Reconsideration TSDR 4-54. In fact, the non-electronic versions of UNO and STREET FIGHTER, and at least some of the non-electronic versions of DUNGEONS & DRAGONS and MONOPOLY, feature playing cards, *id.*, and it seems likely that at least some of the online versions of these games feature electronic versions or equivalents of those playing cards. This third-party use evidence establishes a relationship between the goods and services. *See In re Detroit Athletic*, 128 USPQ2d at 1050 (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co.*, 62 USPQ2d at 1004 (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

Furthermore, the Examining Attorney introduced evidence that well-known card games such as bridge, solitaire, blackjack and gin rummy may be played not just “in real life” with paper, cardboard or plastic cards, but also online, as revealed by these printouts from the AARP, Arkadium, Cardgames.io and Kiloo.com:



April 21, 2020 Office Action TSDR 9-11, 14 (emphasis added). While the traditional card games available electronically on these websites are mostly identified by their generic names, such as “bridge,” rather than by trademarks, such as UNO, the point

here is not that the same marks are used for goods such as Applicant's and services such as Registrant's. Rather, the point here is that consumers are aware that certain games, including card games, can be played either offline with physical cards or online with the digital equivalent of traditional cards. When we combine the evidence that several trademarks are used for goods such as those identified in the involved application and services such as those identified in the cited registration with the evidence that as a general matter card and board games may be played either online or "in real life," we find that the goods and services are related. This factor also weighs in favor of finding a likelihood of confusion.

The related goods and services also travel in the same channels of trade to the same classes of consumers. For example, the "amazon.com" listing for "Street Fighter: Deck Building Game," a board/card game played "in real life," also promotes electronic versions of a traditional board game for the Gameboy video game system. July 8, 2021 Denial of Request for Reconsideration TSDR 35, 36, 39, 41. Similarly, Hasbro's Monopoly game's website offers MONOPOLY BID, a "fast, fun card game," and also MONOPOLY-themed "featured apps," including MONOPOLY JUNIOR and MONOPOLY MOBILE. *Id.* at 20-23; *see also id.* at 28-34. The "wizards.com" DUNGEONS & DRAGONS site offers both "digital" and "tabletop" DUNGEONS & DRAGONS games, explaining that "D&D has grown far beyond the confines of the blue box it came in once upon a time. New tabletop board games, online and offline digital games, novels and treasure chests full of loot bring the D&D experience to life wherever you are." *Id.* at 15-19. And Mattel's UNO site offers and discusses both card

and app-based versions of the game. *Id.* at 4-14. This evidence shows that the channels of trade for card games and online computer games overlap.

The consumers for these types of games also overlap. The “playingcarddecks.com” article “40+ Great Card Games for All Occasions” lists and describes games playable on “a beautiful deck of custom playing cards,” and includes sections subtitled “Play Using an App” and “Play Online.” April 21, 2020 Office Action TSDR 16-28. Those sections state “[i]f you are not quite sure on the rules of how to play a specific card game mentioned above, there are plenty of apps available that will help you with that,” and “[t]here are quite a few software programs for card games that are readily available as well.” *Id.* at 26. This shows that card game players/consumers may play and be exposed to the same card games in real life and online. Similarly, the “About Us” section of the “cardgames.io” site states “Cardgames.io is a game site focused on **classic card and board games**. Our goal is to make great **versions** of the games you **already know and love in real life**.” *Id.* at 11 (emphasis added). This reveals both that players/consumers of many traditional or “classic” card and board games may also play and be exposed to those same games online.

These factors also weigh in favor of finding a likelihood of confusion.

### **III. Conclusion**

The marks are highly similar, the goods and services are related and the channels of trade and classes of consumers overlap. Confusion is likely.

**Decision:** The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is affirmed.